UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington D.C. 20570

July 12, 2004

Mr. Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Re: Allied Mechanical Services, Inc., Cases 7-CA-40907, 7-CA-41390, 341 NLRB No. 141 (2004)

Dear Mr. Heltzer:

Enclosed please find an original and eight (8) copies of the General Counsel's Motion for Reconsideration and Brief in Support in the above-referenced matter.

Please file these documents with the Board. Thank you for your assistance in this matter.

Very truly yours,

Kayce R. Compton
Attorney
Counsel for the General Counsel
(202) 273-2491

Enclosures
cc: Parties on Certificate of Service

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALLIED MECHANICAL SERVICES, INC.

and

Nos. 7-CA-40907
7-CA-41390

PLUMBERS and PIPEFITTERS LOCAL 357,
UNITED ASSOCIATION of JOURNEYMEN
and APPRENTICES of the PLUMBING
and PIPEFITTING INDUSTRY of the
UNITED STATES and CANADA, AFL-CIO

GENERAL COUNSEL'S MOTION FOR RECONSIDERATION AND BRIEF IN SUPPORT

Pursuant to Section 102.48(d)(1), (2) of the Board's Rules and Regulations, the General Counsel requests that the Board reconsider its Decision and Order in the above-captioned case, reported at 341 NLRB No. 141. The Decision and Order issued on May 28, 2004. By order dated June 22, 2004, the Office of the Executive Secretary extended the time for filing a motion for reconsideration to July 16, 2004.

Section 102.48(d)(1) permits any party to move the Board for reconsideration of a decision in "extraordinary circumstances." The General Counsel respectfully submits that the Board's holding in the instant case that the Union merger failed to satisfy the Board's due process standard due to the absence of a membership vote, is not supported by extant Board law. Further, the Board's failure to address the General Counsel's

argument and provide an explanation for its holding is an "extraordinary circumstance" meriting reconsideration. Compare Reichhold Chemicals, 288 NLRB 69, 69 (1988), enfd. in relevant part sub nom. Teamsters Local 515 v. NLRB, 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991), supp. decision on remand 301 NLRB 706 (1991) (granting reconsideration in order to clarify original decision which contained an "imprecise description of the process the Board undertakes in evaluating ... good-faith bargaining") with KSM Industries, Inc., 337 NLRB 987, 987 & n.2 (2002) (no extraordinary circumstances sufficient to reconsider ultimate result where, in part, employer failed to attack applicability of Board law to case or seek reversal of Board's conclusions of law). Cf. also Cleveland Constr., Inc. v. NLRB, 44 F.3d 1010, 1016 (D.C. Cir. 1995) (Board's unit finding in 8(f) context set aside because of Board's failure to reconcile Board authority and by its "silent departure from precedent"); Shaw's Supermarkets, Inc. v. NLRB, 884 F.2d 34, 36-41 (1st Cir. 1989) and cases cited therein (Board cannot depart from its established precedent without a recognition of, and an explanation for, its departure). Because the Board's failure to provide an explanation for its decision will raise difficulties in the administration of the Act, the General Counsel respectfully submits that reconsideration of the instant case is warranted. See, e.g., Reichhold Chemicals, 288 NLRB at 69 n.6 ("[t]he supplemental decision filed today is an effort to eliminate the unintended uncertainty created in the wake of the Board's original Decision and Order").

I. THE BOARD'S DECISION AND ORDER

In its decision, the Board (Chairman Battista and Members Schaumber and Meisburg) affirmed the ALJ's dismissal of the General Counsel's complaint allegation

that Allied Mechanical Services (Employer) violated Section 8(a)(5) by withdrawing recognition from the Charging Party, Plumbers and Pipefitters Local 357 (Union), relying solely on the ALJ's finding that the Union did not succeed to the bargaining rights of former Local 337 following Local 337's merger with Local 513. Slip op. at 1. The Board held that the Employer had no duty to bargain with the Union, and privileged the Employer's withdrawal of recognition from the Union, because the Union merger did not satisfy the "Board's [due process] standard" for union mergers, based solely on the fact that former Local 337's members were not given an opportunity to vote on the merger. Ibid.

The Board cited NLRB v. Financial Institution Employees (Seattle-First National Bank), 475 U.S. 192, 199 (1986) and Minn-Dak Farmers Coop., 311 NLRB 942, 945 (1993), enfd. 32 F.3d 390 (8th Cir. 1994) for the proposition that an employer's duty to recognize and bargain with a union following a union merger or affiliation continues unless,

> [T]he union's members did not have an adequate opportunity to participate in a vote on the merger, the vote was conducted without adequate due process safeguards, or the merger caused changes so significant that substantial continuity was lost between the pre- and post-affiliation union.[1]

The Board concluded that the Union merger did not satisfy this proposition because "Local 337's members were not given an opportunity to vote on the merger." Ibid.

[1] The Supreme Court in Seattle-First did not hold that this test was required in union merger/affiliation cases; rather, it simply noted that the Board normally examined these factors when considering whether to amend a union's certification. 475 U.S. at 199.

II. THE BOARD SHOULD PROVIDE AN EXPLANATION FOR ITS DECISION THAT DUE PROCESS REQUIRES A MEMBERSHIP VOTE

The General Counsel submits that the Board's holding that a membership vote is required to satisfy the Board's due process standard is not supported by extant Board law. Moreover, the Board failed to address the General Counsel's argument at pages 24-29 of the Brief in Support of Exceptions that after Seattle-First, due process is no longer relevant to union mergers/affiliations.[2] The General Counsel therefore requests that the Board reconsider its decision in order to articulate an explanation for its decision and address the propriety of the General Counsel's argument.[3]

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[2] Unlike in the instant case, the Board has specifically stated in prior cases that it was unnecessary to decide whether the lack of due process raised a QCR, where the Board found that the union merger/affiliation at issue satisfied the due process requirement: Sullivan Brothers Printers, Inc., 317 NLRB 561, 562 n.2 (1995), enfd. 99 F.3d 1217 (1st Cir. 1996) (because "due process" requirements were met, "we find it unnecessary to determine whether, in view of the Supreme Court's opinion in Seattle-First, the Board lacks authority to impose due process requirements"); Paragon Paint & Varnish Corp., 317 NLRB 747, 748 (1995) (same, citing Toyota of Berkeley, 306 NLRB 893, 899 n.6 (1992)), enfd. mem. 90 F.3d 591 (D.C. Cir. 1996) (court stated order could not run to merged union absent explanation of due process voting requirements), supp. decision 323 NLRB 882 (1997); May Department Stores Co., 289 NLRB 661, 665 n.16 (1988), enfd. 897 F.2d 221 (7th Cir.), cert. denied 498 U.S. 895 (1990) (same); Hammond Publishers, Inc., 286 NLRB 49, 50 n.8 (1987) (since both factors were met, Board did not have to address the issue left open in Seattle-First of "whether both continuity of representation and due process must be satisfied in all affiliation cases").

[3] While urging the Board to adopt the theory that a finding of substantial continuity of representation renders due process irrelevant to the existence of a QCR, Counsel for the General Counsel "conceded" the lack of due process. That concession does not remove the need for the Board to explain its decision and to distinguish extant Board law. See, e.g., IBEW Local 803 v. NLRB (Metropolitan Edison), 826 F.2d 1283, 1295-96 n.22 (3d Cir. 1987) (rejecting Board counsel's concession concerning bearing of circuit law on facts of case); see also Young v. United States, 315 U.S. 257, 258 (1942) (confession of error "does not relieve th[e] Court of the performance of the judicial function").

A. GENERAL PRINCIPLES

As a general principle, an employer is obligated to continue to bargain with a representative that has merged or affiliated with another union. See Minn-Dak Farmers Coop., 311 NLRB at 944. Traditionally, the Board has stated that generally it would relieve an employer of that bargaining obligation only if the employer proved that the merger or affiliation was accomplished without minimal due process, and/or that it resulted in a discontinuity of representation between the old and new bargaining representatives. See, e.g., Mike Basil Chevrolet, 331 NLRB 1044, 1044, 1045 (2000); CPS Chemical Co., 324 NLRB 1018, 1019-25 & n.7 (1997), enfd. 160 F.3d 150 (3d Cir. 1998); Western Commercial Transport, 288 NLRB 214, 217 (1988). Although most union mergers/affiliations result in some degree of change to the union's organizational structure, the Board will intervene in such "internal union matters" only where it finds that the merger/affiliation raises a question concerning representation (QCR). Sullivan Bros. Printers, 317 NLRB at 562; Minn-Dak Farmers Coop., 311 NLRB at 945. Cf. Western Commercial Transport, 288 NLRB at 217, 218 ("[t]he Board's role in affiliation cases is to determine whether the affiliation raises a question concerning representation .... [O]nce a question concerning representation is raised as a result of dramatic changes in the bargaining representative, an affiliation vote cannot be used as a substitute for a representation proceeding before the Board...."). The existence of a QCR is therefore a prerequisite for Board intervention in union merger/affiliation matters. Consistent with this approach, the Board will interject itself, "only in the most limited of circumstances involving such internal changes." Sullivan Bros. Printers, 317 NLRB at 562.

B. THE BOARD HAS NEVER REQUIRED A MEMBERSHIP VOTE

The Board's holding, that the Union merger did not satisfy the Board's due process standard because it lacked a membership vote, is not supported by Board law. Although the Board relied on Seattle-First and Minn-Dak Farmers Coop. for the proposition that a vote is required, neither case stands for that proposition. Indeed, the Board has never held that the lack of a vote, per se, is cause for the Board's intervention into the union's internal processes. The General Counsel therefore submits that the Board needs to provide an explanation as to why due process in general, and a membership vote in particular, are required in union merger/affiliation cases.

Seattle-First, relied on by the Board, does not stand for the proposition that a membership vote is required; indeed, the Court specifically did not address the propriety of the Board's due process requirements. Seattle-First, 475 U.S at 199 n.6. Rather, the necessity of a QCR for Board intervention was at the heart of Seattle-First. In this regard, the Court held that the Board has no authority to interfere in union internal matters absent changes in the representative "sufficiently dramatic" to alter the union's identity and raise a QCR. Id. at 206. The Court found that because the union's affiliation had not raised a QCR, the Board had no authority to "prescribe internal procedures for the union to follow in order to invoke the Act's protections," and specifically held that the Board may privilege an employer's refusal to bargain only if the Board finds that an affiliation (or merger) raises a QCR. Id. at 207-208.[4] By declining to pass on the Board's due process requirement, the Court found that requirement irrelevant to the existence of a QCR.

[4] Indeed, the Board's new membership voting requirement, by definition, more directly intrudes into internal union procedures than did the Board's nonmember voting requirement, rejected by the Court in Seattle-First. In this regard, after Seattle-First, the

Nor does Minn-Dak, also relied on by the Board, hold that due process requires a membership vote. The Board in Minn-Dak considered whether the vote at issue lacked due process because of the union's failure to follow its internal bylaws and/or voting procedures. Minn-Dak Farmers Coop., 311 NLRB at 945. The Board evaluated the voting procedures not because due process required a membership vote, per se, under Board precedent, but to determine whether the union's failure to follow its internal procedures somehow tainted the vote and thus raised a QCR. Thus, the Board linked its due process requirement to the question of whether a QCR was raised and found that the employer had failed to establish that the scope of the participation in the affiliation vote (less than a majority) subverted due process sufficiently to raise a QCR. Ibid. Because no QCR was raised, the Board held that the union's failure to follow its bylaw did not cause the affiliation vote to lack due process. Ibid.

Thus, neither Seattle-First nor Minn-Dak hold that a membership vote is required. Rather, each holds that the Board's authority to pass on internal union voting procedures arises only when a QCR exists. The Board failed to explain how the lack of a membership vote raised a QCR in the instant case. This is especially significant since the Board previously has found that due process can be satisfied, and no QCR is raised, even when there is no membership vote.[5]

Board lacks authority to require a vote of all unit members in determining whether a merger/affiliation raises a QCR, which is relevant in the context of deciding whether to direct elections among unit employees under Section 9. *A fortiori*, the Board has no authority to require a vote in that portion of the unit comprised only of full union members since a "partial unit" is antithetical to QCR determinations.

[5] See, e.g., City Wide Insulation, 307 NLRB 1, 1, 4 (1992); Knapp-Sherrill Co., 263 NLRB 396, 399 (1982); Texas Plastics, 263 NLRB 394, 394, 395 (1982); House of the Good Samaritan, 248 NLRB 539, 539, 544-45 (1980); Aurelia Osborn Fox Memorial

C. DUE PROCESS IS IRRELEVANT IN UNION MERGER/AFFILIATION CASES

By definition, a QCR exists after a merger/affiliation only where there has been a change in representation, "sufficiently dramatic to alter the union's identity." May Department Stores Co., 289 NLRB at 665 (emphasis and citations omitted). Conversely, substantial continuity exists when the merged/affiliated union is the same union, in substantial part, as that selected by the unit employees initially to be their bargaining representative. Indeed, "the significant factor is whether there is an identity change as a result of the [merger or] affiliation." Mike Basil Chevrolet, 331 NLRB at 1044.

Because substantial continuity depends solely on the identity of the representative remaining the same, it is evaluated in each case by a factual comparison between the "old" and "new" bargaining representatives. The Board examines several factors to determine whether the essential nature of a bargaining representative as it affects the employees has been altered, including, continued leadership responsibilities for existing union officials; extension of membership rights and duties in the new union to former members of the old union; authority to change provisions in the governing documents; changes in dues structure; frequency of membership meetings; continuity in the manner in which contract negotiation, administration, and grievance processing are effectuated; and the preservation of physical facilities, books, and assets. See Western Commercial Transport, 288 NLRB at 217 (footnote omitted).

No single factor is determinative, and the Board evaluates the totality of these factors to determine whether substantial continuity has been maintained. See, e.g., ibid.;

Hospital, 247 NLRB 356, 357, 359 (1980). Although the last four cases predate Seattle-First, that decision did not, as noted, affect the viability of those holdings.

Mike Basil Chevrolet, 331 NLRB at 1044 (citation omitted) ("[i]n assessing continuity questions we consider the totality of the circumstances, eschewing the tendency toward a 'mechanistic approach' or the use of a 'strict checklist'"). If the Board finds substantial continuity in representation, i.e., the employees' representative has remained essentially the same, then by definition no QCR exists that would justify Board intervention. Compare Quality Inn Waikiki, 297 NLRB 497, 497 n.1 (1989) ("we agree with the judge that the trusteeship and subsequent merger created sufficiently dramatic changes that altered the identity of the representing organization to the extent that it raised a question concerning representation") with Mike Basil Chevrolet, 331 NLRB at 1045 ("we find that there is not a sufficient loss of continuity here to warrant a finding that the affiliation occasioned a question concerning representation").

A QCR is thus raised only where the merged/affiliated union is, in fact, a different union from the one formerly designated as the employees' representative. As the Board stated in Western Commercial Transport, 288 NLRB at 217:

> In determining whether a "question concerning representation" exists because of lack of continuity, the Board is not directly inquiring into whether there is majority support for the labor organization after the changes at issue, but rather is seeking to determine whether the changes are so great that a new organization has come into being....

Because the due process prong of the Board's test does not impact the identity of the employees' representative, an alleged lack of due process cannot alone raise a QCR. Cf. Seattle-First, 475 U.S. at 205-206 ("[w]e repeat, dissatisfaction with the decisions union members make may be tested by a Board-conducted representation election only if it is unclear whether the reorganized union retains majority support"). As such, an alleged

lack of due process, including the lack of a membership vote, is irrelevant to the existence of a QCR and to the Board's analysis.

As set forth in the General Counsel's brief at pages 25-28, the due process requirement finds its roots in the Board's pre-Seattle-First cases, in which the Board required the vote of all represented employees for mergers/affiliations.[6] In these early cases, the Board emphasized evidence of employee approval of the merger/affiliation when evaluating continuity. See, e.g., Paramount Pictures, Inc., 42 NLRB 221, 223 (1942) (denying motion to amend certification where it was unclear whether a majority of employees in appropriate units voted to affiliate). While employee sentiment was not the sole factor which the Board discussed in finding that an affiliation or merger did or did not create a QCR, it clearly was the Board's overarching concern in determining whether there is continuity of representative. Evidence of employee support was considered necessary when evaluating continuity because the Board was giving effect to union-run affiliation or merger elections as alternatives to statutory procedures under the Act.[7] As such, in order to change a certification, the Board needed to assure itself that the new organization was not materially different from the certified organization (and, therefore,

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[6] The Board was not always consistent on the issue of whether nonmember employees must be allowed to vote on union mergers/affiliations, however. Compare Jasper Seating Co., 231 NLRB 1025, 1026 (1977) (Board did not honor affiliation because nonmember employees had no opportunity to vote) with Amoco Production Co. (Amoco III), 239 NLRB 1195, 1195, 1195 n.3 (1979), remanded 613 F.2d 107 (5th Cir. 1980) (overruling Jasper) and Amoco Production Co. (Amoco IV), 262 NLRB 1240 (1982), enfd. 721 F.2d 150 (5th Cir. 1983) (reversing its 1979 decision in Amoco III). The Board ultimately concluded in the Amoco line of cases that nonmember employees must be given an opportunity to vote on affiliation, regardless of whether their votes were sufficient in number to affect the election result. Amoco IV, 262 NLRB at 1241, 1241 n.12.

[7] The development of law in this area was normally in the context of a union seeking to amend a certification based on an affiliation/merger.

no QCR had been raised). Put another way, if the merger/affiliation election satisfied due process standards then there was continuity of representation. The Board believed that the expression of employee desires, as protected by standards of due process, insured continuity of representation because it was the expression of employee desires protected by the Board election that resulted in the union's initial certification. See, e.g., Quemetco, Inc., 226 NLRB 1398, 1399 (1976) (Board found no QCR where affiliation vote was unanimous, despite lack of continuity factors; "employees' freedom to select a bargaining representative of their choice ... is of paramount importance under the Act").

Whatever validity the due process standard may have once had, it is of no relevance after Seattle-First. Indeed, as discussed above in footnote 4, because the Board can no longer require the vote of nonmember employees, a vote limited to only part of the unit (the union membership) will not accurately reflect the sentiment of the entire unit. Thus, the due process requirement, and a membership vote in particular, are irrelevant, since neither reflects the accurate sentiments of the unit as a whole.

Although the rationale of Seattle-First eliminates the practical relevance of the due process requirement, it nonetheless adequately protects the interests of the unit majority. A union that does not lose its identity in a merger/affiliation remains, in fact and law, the same union initially certified by the Board. As such, the unit employees' interests (including those of nonmembers) are automatically protected since they have experienced no change in representation. The Board recognized this in Western Commercial Transport, 288 NLRB 214, a post-Seattle First amendment of certification case arising out of an affiliation/merger. In Western Commercial Transport, the Board

significantly moved in the direction of abandoning the due process requirement altogether by holding that once a QCR is raised because of a lack of continuity, "an affiliation vote cannot be used as a substitute for a representation proceeding before the Board...." Id. at 217, 218 & n.13 (overruling Quemetco, 226 NLRB 1398 (1976), to the extent that it held that an amendment to certification could be granted based on a unanimous employee vote, despite a lack of evidence of continuity of representative). Thus, as demonstrated by Seattle-First and Western Commercial Transport, the substantial continuity test obviates the need for a due process analysis and/or a vote requirement. The expression of employee sentiment is no longer paramount and the underlying rationale for employee member voting and due process in general no longer exists.

D. DUE PROCESS IS A CONSIDERATION UNDER THE LMRDA, NOT THE NLRA

Finally, a due process challenge to a union merger/affiliation is more properly brought under the Labor-Management Reporting and Disclosure Act (LMRDA) than under the NLRA. Section 101(a)(5) of the LMRDA states:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. § 411(a)(5) (1994).

Courts have held that the due process standards of Section 101(a)(5) of the LMRDA are applicable to union mergers/affiliations. See, e.g., generally, Calabrese v. United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, 211 F.Supp. 609, 613-14 (D. N.J. 1962), affd. 324 F.2d 955 (3d Cir. 1963) (union members

who lost membership after merger were denied due process protections of Section 101(a)(5)). Application of Section 101(a)(5) to union mergers depends on whether the merger/affiliation constitutes "discipline" under that Section. See Local 37 v. Sheet Metal Workers, 655 F.2d 892, 896-97 (8th Cir. 1981) (whether merger/affiliation constitutes discipline under Section 101(a)(5) depends on how the merger/affiliation affects members' rights, including right to vote, hold office, acquire job opportunities, participate in welfare/pension funds, share in the assets of the disappearing local, and contract rights). Some courts have found that the controlling consideration is the effect of the merger/affiliation on the union members, see id. at 896-98; Pittman v. United Bhd. of Carpenters & Joiners, 251 F.Supp. 323, 324 (M.D. Fla. 1966) (motive is irrelevant under Section 101(a)(5)); Parks v. IBEW, 314 F.2d 886, 920-22, 925-26 (4th Cir.), cert. denied 372 U.S. 976 (1963) (although Section 101(a)(5) was applicable to revocation of local's charter where members' rights affected, Section was not violated), while other courts have required an additional finding that the merger/affiliation was undertaken in bad-faith in order to invoke Section 101(a)(5) protections, see, e.g., Local 48 v. United Bhd. of Carpenters & Joiners, 920 F.2d 1047, 1056 (1st Cir. 1990).

Regardless of whether motive is a factor, courts interpreting Section 101(a)(5) consider the impact of a union merger/affiliation on union members' rights and privileges. rather than on whether the union has undergone an identity change (i.e., the existence of a QCR). Because due process by definition implicates employees' rights and privileges, a due process challenge to a union merger/affiliation is better left to the courts interpreting the LMRDA than to the Board, which is precluded from second-guessing a union's internal matters, absent the existence of a QCR. Cf. Seattle-First, 475 U.S. at 199

n.6 ("we note that the NLRA does not require unions to follow specified procedures in deciding matters such as affiliations").

III. CONCLUSION

For the foregoing reasons, the General Counsel respectfully requests that the Board reconsider its decision in order to address the General Counsel's position that due process is irrelevant in union merger/affiliation cases.

Respectfully submitted,

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Dated: July 12, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the General Counsel's Motion for Reconsideration and Brief in Support was duly sent by U.S. first class mail to all parties listed below on this 12th day of July, 2004.

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